

7 Official Opinions of the Compliance Board 245 (2011)

- **Administrative Function**
 - **Outside the Exclusion**
 - **discussion of lease of public entity's property to another entity**
- **Closed Session Procedures**
 - **Written Statement**
 - **In Violation**
 - **Uninformative boilerplate**
 - **General**
 - **In Violation**
 - **Failure to cite the correct basis for the closing**
- **Exceptions Permitting Closed Session**
 - **Legal Advice, §10-508(a)(11)**
 - **Within Exception**
 - **Counsel's advice on lease**
- **Minutes**
 - **Generally**
 - **closed session minutes to contain meaningful information**

July 13, 2011

*Nicholas Maravell
Victoria Cowles
Complainants*

*Montgomery County Board of Education
Respondent*

We have considered the allegations of Nicholas Maravell and Victoria Cowles (“Complainants”) that the Montgomery County Board of Education (“County Board”) violated the Open Meetings Act (“the Act”) by discussing in a closed meeting or meetings a proposal to lease property to Montgomery County. We conclude that the County Board violated the Act in a number of ways.

I

The Parties' Contentions

Complainants allege that the Montgomery County Board of Education improperly closed a meeting to discuss the lease of the Brickyard Middle

School (“Brickyard”) site and also did not comply with the Act with respect to its March 28, 2011 Report of Closed Session.

The County Board responds that the discussion of the lease of the Brickyard site to Montgomery County was an administrative function and therefore not subject to the requirements of the Open Meetings Act. Alternatively, the County Board asserts that the discussion of the Brickyard lease in the closed session fits into the exception provided in §10-508(a)(7)¹ which states that “a public body may meet in closed session or adjourn an open session to a closed session only to ... consult with counsel to obtain legal advice.”²

II

Facts

For the facts, we look to the written resolutions adopted by the County Board as its basis for closing the March 8 meetings, its March 28 report of those closed meetings, the sworn affidavit of the County Board’s legal counsel, and the minutes of the closed meetings, which we shall keep confidential.

Listed on the agenda for the March 8, 2011 meeting of the County Board was Item 4.2.5 “Lease Agreement – Brickyard Road Site,” which was a proposed action for the approval of a lease of the Brickyard property to Montgomery County. Also on the agenda for that meeting was Item 1.1 “Resolution for Closed Session.” That resolution, by which the County Board resolved to “discuss matters relating to the use of real property for a public purpose and matters directly related thereto, as permitted under Section 10-508(a)(3) of the *State Government Article*,” was adopted unanimously.³ Two

¹ Unless specified otherwise, all statutory references are to the State Government Article, Annotated Code of Maryland.

² In *7 OMCB Opinions* 208 (2011), we addressed a complaint that also arose from the County Board’s consideration of the lease of the Brickyard site. That complaint alleged that the County Board violated the Act by improperly using exception §10-508(a)(3), the acquisition of real property, when closing a session to discuss the site. The County Board responded that §10-508(a)(3) was applicable and alternatively that the discussion was an administrative function not subject to the Act. We found that the County Board violated the Act because its discussion of the lease constituted neither the “acquisition” of real property nor the exercise of an administrative function.

³ As we stated in *7 OMCB Opinions* 208 (2011), the exception is limited to matters relating to the *acquisition* of real property, and the County Board’s substitution of the word “use” is incorrect.

closed meetings were held on March 8. The first closed meeting was held from 9:05 to 9:55 a.m. and the second from 1:50 to 2:50 p.m.

The previous day, on March 7, legal counsel to the County Board was contacted by staff and asked to attend the closed meeting scheduled for the afternoon of March 8. The March 28 “Report of Closed Sessions” evidences that counsel was in attendance at the closed afternoon session. In his affidavit, counsel states:

The discussion [in the afternoon meeting] pertained to legal issues relating to the expiring lease and the proposed lease with Montgomery County. I gave advice relating to these matters. The only discussion related to legal questions. There was no planning by the Board or discussion of “how to address the community’s concerns,” beyond those that were legal in nature.

The March 28 “Report of Closed Sessions” summarizes the Board’s discussions at the March 8 closed meetings. The summary notes that the Board “discussed matters relating to the use of real property for a public purpose and matters directly related thereto, as permitted under Section 10-508(a)(3) of the *State Government Article*.” The closed session minutes reiterate this language, reflect the presence of counsel, and refer to the discussion as “an administrative function.”

III

Discussion

We begin with the County Board’s contention that discussion of the lease was an administrative function. The Act does not apply to “a public body when it is carrying out an administrative function.” State Government Article (“SG”) §10-503 (a)(1). The Act defines “administrative function” as “the administration of a law of the State, a law of a political subdivision of the State, or a rule, regulation, or bylaw of a public body.” SG §10-502 (b)(1). The County Board views its discussion of the disposition of the Brickyard lease as the administration of §4-114 of the Education Article (“ED”), which states that “all property granted, conveyed, devised, or bequeathed for the use of a particular public school or school system...shall be held in trust for the benefit of the school or school system by the appropriate county board...” This argument fails to consider the rest of the definition of “administrative function.” The Act specifies five exclusive functions which are exceptions to an administrative function. One of those excepted functions is the “quasi-legislative function,” *See* SG §10-502(b)(2), which the Act defines as “the process or act of...approving, disapproving, or amending a contract.” SG

§10-502 (j). The County Board's discussions about leasing the Brickyard property were part of the process of approving the lease contract and were, therefore, quasi-legislative and not administrative functions.

The County Board now states that its citations to §10-508(a)(3) in the March 8 Resolution for Closed Sessions and the March 28 Report of Closed Sessions were incorrect and that the meetings were, in fact, lawfully closed according to §10-508(a)(7), the exception for consultation with counsel to obtain legal advice. We have explained that "the statutory reference must reflect the specific provision(s) under §10-508(a) in order that the public can evaluate the stated reason against the applicable statutory provision." 7 *OMCB Opinions* 36, 40 (2010). A public body "may not advance, after the fact, an exception that was not properly presented and voted on at the time of a closing of a session." 1 *OMCB Opinions* 71, 78 (1994). The County Board thus violated the Act by not providing an accurate citation to the authority in its Resolution for Closed Sessions and Report of Closed Sessions.

Had the County Board claimed the legal counsel exception, the discussion may have fallen within it. In this regard, we rely on counsel's affidavit, not the minutes of the closed session. Those minutes are worded so generally as to convey no meaningful information about the scope of the discussion. As for any meeting governed by the Act, minutes for a closed meeting must be kept. 7 *OMCB Opinions* 5, 6 (2010). They also must convey meaningful information. See SG §10-509(c) (requiring, at a minimum, that minutes reflect each item that the public body considered, the action taken on each item, and each recorded vote); see also 6 *OMCB Opinions* 164, 168-9 (2009) (stating "that each item considered is to be described in sufficient detail so that a member of the public... can gain an appreciation of the issue").

Like the closed-session minutes, the County Board's closing statement and summary of the closed meeting included only boilerplate language. We have held that, while a public body need not disclose a level of detail about a topic to be discussed in closed session that would undermine the confidentiality permitted by the Act, "saying nothing beyond the statutory language deprives the public of information to which it is entitled." 5 *OMCB Opinions* 160, 163 (2007) (quoting 4 *OMCB Opinions* 114, 118 (2005)). Accordingly, we also find that the County Board violated the Act by failing to provide adequate information in its closed-session minutes, closing statement, and closed-session summary.

IV

Conclusion

The County Board's citation to SG §10-508(a)(3) was incorrect, and the County Board's reference to an exception for matters pertaining to the "use" of real property was inaccurate. We conclude that the County Board violated the Open Meetings Act when it convened a closed session on the basis of a closing resolution that did not meet the requirements of SG §10-508(d)(2), when it discussed matters exceeding the scope of the exception it claimed, when it did not prepare meaningful minutes of its closed session, and when it did not include meaningful information about the session in the minutes of its subsequent open meeting. *See 7 OMCB Opinions 208 (2011)* (addressing the County Board's version of the exception). The administrative exclusion did not apply.

OPEN MEETINGS COMPLIANCE BOARD

Elizabeth L. Nilson, Esquire
Courtney J. McKeldin
Julio A. Morales, Esquire

*Paul J. Norton, intern in the office of the Attorney General, contributed significantly to the drafting of this opinion.